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**THE ROLE OF THE CISG IN U.S. CONTRACT PRACTICE:  
AN EMPIRICAL STUDY**

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ABSTRACT

The United Nations Convention on Contracts for the International Sale of Goods (“CISG”) operates as an “international” version of UCC Article 2—it supplies the governing law when a U.S. company enters into a contract for the sale of goods with a foreign counterparty. Scholars have long debated the role the CISG plays in contract practice in the United States. Some argue that the CISG has come to be embraced, if slowly, by U.S. lawyers. Others contend that the CISG has yet to achieve widespread acceptance within the U.S. legal community. Prior studies have sought to resolve this debate by looking to surveys of practicing attorneys. This Article seeks to shed light on this question by looking to actual contracts entered into by U.S. companies.

The Article draws upon a hand-collected dataset of more than 5,000 contracts, along with interviews with several lawyers who had a hand in their drafting, in an attempt to better under-

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stand the role that the CISG plays in U.S. contract practice. The Article shows that: (1) many U.S. companies reflexively exclude the CISG without inquiring as to whether it would apply of its own force; (2) U.S. companies virtually never select the CISG as the law to govern their agreements; (3) there is no industry or geographic location within the United States where the CISG has been affirmatively embraced; (4) some U.S. companies that had selected the CISG in the past now have a policy of excluding it from their contracts; and (5) U.S. companies are frequently unaware that selecting the law of a U.S. state can result in the application of the CISG.

These findings suggest a number of important insights. First, they show that past surveys of U.S. lawyers dramatically overstate the extent to which the CISG has gained acceptance within the U.S. legal community. Second, they indicate that contract practice with respect to the CISG can and does vary from nation to nation. The dataset contracts show that Chinese solar companies, in contrast to their U.S. counterparts, have embraced the CISG. Finally, they highlight the potential unfairness of requiring unsophisticated U.S. companies to litigate international contract disputes under a set of treaty rules that are routinely avoided by their more sophisticated brethren.

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## 1. INTRODUCTION

When the United Nations Convention on Contracts for the International Sale of Goods ("CISG") entered into force on January 1, 1988, it was heralded as a singular achievement in the annals of private international law.<sup>1</sup> Scholars were quick to extol the CISG as "a 'quantum leap,' a 'new legal lingua franca,' a 'milestone,' a 'triumph of comparative legal work' and 'arguably the greatest legislative achievement aimed at harmonizing private commercial law.'"<sup>2</sup> They praised its drafters for creating a uniform international sales law "that promotes fair and honorable solutions without affording any obvious or hidden advantages to either side."<sup>3</sup> They spoke of the treaty's importance as a solution to choice-of-law problems that had long bedeviled national courts.<sup>4</sup> And they marveled at the speed with which various nations around the world (including the United States) had acted to ratify the CISG.<sup>5</sup> Judged

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<sup>1</sup> United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988) [hereinafter CISG]; Kevin Bell, *The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods*, 8 PACE INT'L L. REV. 237, 237-38 (1996) ("The United Nations Convention on Contracts for the International Sale of Goods is 'rapidly becoming one of the most successful multi-lateral treaties ever in the field of agreements designed to unify rules traditionally addressed only in domestic legal systems.'" (footnote omitted)).

<sup>2</sup> Bell, *supra* note 1, at 238 (footnotes omitted); see also Larry A. DiMatteo, *The Scholarly Response to the Harmonization of International Sales Law*, 30 J.L. & COM. 1, 21 (2011) ("From humble beginnings, the CISG has grown to be an international phenomenon. It is no longer premature to hail it as the first successful unification of international sales law. It is the culmination of the dream presented by Ernst Rabel in the 1920s.").

<sup>3</sup> Susanne Cook, *CISG: From the Perspective of the Practitioner*, 17 J.L. & COM. 343, 350 (1998).

<sup>4</sup> See Fritz Enderlein & Dietrich Maskow, *INTERNATIONAL SALES LAW* 1 (1992); see also Franco Ferrari, *PIL and CISG: Friends or Foes?*, 31 J.L. & COM. 45, 46-48 (2013).

<sup>5</sup> See UNITED NATIONS COMM'N ON INT'L TRADE LAW, STATUS UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, [www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) [<https://perma.cc/2P2E-79QM>] (last visited Dec. 7, 2016) [hereinafter UNCITRAL, Status on CISG] (listing eighty-five contracting parties to the CISG); see also Peter Huber, *Some Introductory Remarks on the CISG*, 6 INTERNATIONALES HANDELSRECHT [INT'L TRADE L.] 228, 228 (2006) ("The CISG is in force in more than 60 States from all parts of the world, among them both industrial nations and developing states. . . . It is therefore fair to say that the CISG has in fact been one of the success stories in the field of the international unification of private law.") (footnote omitted).

in accordance with these metrics—skillful drafting, substantive harmonization, and number of ratifications—there can be little doubt that the CISG is a runaway success story. Indeed, by these metrics the CISG ranks among the most successful commercial law treaties in modern history.

Judged in accordance with a different metric—how frequently private parties actually *use* the CISG—the evidence of success is less clear. The CISG specifically provides that contracting parties are free to exclude it from their contracts.<sup>6</sup> In cases where the CISG is excluded, the contracts will be governed by national sales law. Several recent surveys of attorneys in the United States and Europe suggest that more than half of respondents in some jurisdictions routinely urge their clients to exclude the CISG from their contracts.<sup>7</sup> These surveys suggest that a sizeable number of attorneys routinely advise clients engaged in international sales transactions to “opt out” of a set of international rules whose sole purpose is to facilitate those transactions and “opt in” to a set of national rules of general application. If these surveys are accurate, they call into question whether the CISG is achieving its intended purpose of facilitating international trade by reducing legal uncertainty in international transactions.

This Article represents the first attempt to look at non-survey data in order to determine the extent to which private actors actually use the CISG.<sup>8</sup> It draws upon an original dataset of more than 5,000 contracts in an attempt to determine the extent to which private parties select or exclude the treaty in their international sales

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<sup>6</sup> See CISG art. 6. Although the CISG constitutes a set of default rules, these rules are “sticky” in that they will apply unless the parties expressly opt out. For a discussion on how to interpret contractual silence in a world of sticky default rules, see *infra* Section 3.2.

<sup>7</sup> See *infra* notes 63 - 86 and accompanying text (discussing exclusion of CISG from U.S. contracts).

<sup>8</sup> Another recent study adopted a similar methodology, albeit with respect to a different contract dataset, to explore why parties draft choice-of-law clauses that select national law in their international contracts. See Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT’L L. & BUS. 455, 455 (2014). Cuniberti’s conclusion that transacting parties tend to choose English and Swiss law more frequently than the law of other nations is generally consistent with the findings set forth in this Article. See *infra* note 106 (explaining how foreign counterparties sometimes prefer to have the law of England govern its international sales contracts over U.S. law); see also Gilles Cuniberti, *The Laws of Asian International Business Transactions*, 25 PAC. RIM L. & POL’Y J. 35, 35 (2016) (finding that English law, U.S. law, and, to a lesser extent, Singapore law dominate the market for law in international contracts in Asia).

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agreements.<sup>9</sup> It also draws upon a number of interviews with in-house attorneys at U.S. companies in an attempt to better understand the factors that influence international choice-of-law decisions at the company level. These sources give rise to a number of specific findings with respect to U.S. contract practice as it relates to the CISG.

First, U.S. companies routinely exclude the CISG from contracts to which it would never apply. It is common, for example, for U.S. companies to exclude the CISG from (1) wholly domestic agreements, (2) contracts not for the sale of goods, and (3) contracts with a foreign counterparty that has its principal place of business in a nation that has not ratified the CISG. This pattern of practice suggests that many U.S. companies reflexively exclude the CISG from their contracts.

Second, the number of U.S. companies that affirmatively choose the CISG is negligible. While it is not strictly necessary for the parties to select the CISG in order for it to govern their contract, there are many good reasons why they may wish to do so if, in fact, they want it to provide the governing law. The fact that a vanishingly small number of U.S. companies have done so in recent years suggests that the treaty has gained little ground as an alternative to national sales law within the U.S. legal community.

Third, the CISG lacks any clear locus of support within the United States. A comprehensive review of the dataset contracts in which the CISG was chosen as the governing law failed to identify any particular U.S. industry or U.S. state in which that treaty has been embraced. To the extent that the CISG has a constituency in the United States, that constituency appears to consist principally of law professors. There is no evidence suggesting that it has been widely embraced by private actors actually engaged in buying and selling goods in international trade.

Fourth, the CISG derives remarkably little support today even among those companies that have selected it to govern their contracts in the past. Several of the companies that had chosen the CISG as the governing law in prior contracts now report that their first preference is for contracts to be governed by the law of their home nation. Their second preference is for the national sales law of a neutral third country. The CISG is chosen only as a last resort in contracting situations that present idiosyncratic issues that arise

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<sup>9</sup> See *infra* notes 51–56 and accompanying text (discussing the process by which this Article’s dataset was assembled).

infrequently in the ordinary course of business.

Fifth, companies in other countries have proved more welcoming with respect to the CISG than U.S. companies. Chinese solar companies, for example, are CISG enthusiasts. They routinely choose it to govern their international sales agreement. While there is an element of self-interest here—Chinese national sales law mirrors the CISG in many respects—the contracts dataset suggest that the CISG has achieved a greater level of acceptance in China than it has in the United States.

Finally, there is no evidence that U.S. companies knowingly select the CISG “indirectly” when they choose to have their international supply contracts governed by the law of a U.S. state without referencing the CISG. A number of U.S. judges have reasoned that because the law of the State of New York necessarily includes federal law, and federal law necessarily includes properly ratified treaties like the CISG, the choice of New York law amounts to a *de facto* selection of the CISG.<sup>10</sup> However attractive this syllogism may seem as a matter of logic, it is inconsistent with the lived experiences of many U.S. companies that are unaware that the selection of New York law may result in the application of the CISG.

In summary, the evidence derived from a review of the available contracts paints a far bleaker picture than do existing attorney surveys with respect to the role of the CISG in U.S. contract practice. These findings have significant implications for the ongoing scholarly debate as to the impact of the CISG. Some scholars have taken the position that “[e]ven though much has been written about the skepticism of commercial practice towards the Convention and of the CISG’s allegedly minor role in the legal community, today this position may be regarded as by and large disproven.”<sup>11</sup> Other scholars have argued that “the claim that the CISG is generally being excluded in practice, although still often heard and read, is not supported by empirical evidence.”<sup>12</sup> Though one must be cautious not to read too much into a single study, the empirical evidence presented in this Article suggests that U.S. attorneys *are* quite skeptical of the CISG and that U.S. companies *do* regularly

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<sup>10</sup> See, e.g., *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Tech. Fabrics Can. Ltd.*, 474 F. Supp. 2d 1075, 1081–82 (D. Minn. 2007).

<sup>11</sup> Ingeborg Schwenzer & Pascal Hachem, *The CISG—Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 458 (2009) (footnote omitted).

<sup>12</sup> Ulrich G. Schroeter, *Empirical Evidence of Courts’ and Counsels’ Approach to the CISG (with Some Remarks on Professional Liability)*, in INTERNATIONAL SALES LAW A GLOBAL CHALLENGE 649, 667–68 (Larry A. DiMatteo ed., 2014).

exclude this treaty from their international supply agreements.<sup>13</sup> These findings squarely contract the claims made by the scholars quoted above.

The Article proceeds as follows. Part 2 offers a brief history of the CISG and reviews the existing empirical scholarship as it relates to CISG opt outs. Part 3 describes the methodology used in assembling the primary dataset of contracts used in this Article. Part 4 draws upon this dataset, along with a number of supplemental interviews with individuals who helped to draft these agreements, to describe the role that the CISG plays in U.S. contract practice today. Part 5 discusses how and why the patterns of practice in China currently differ from those in the United States. Part 6 describes the methodology used in assembling a secondary dataset of contracts. It then draws upon interviews with individuals who helped to draft these agreements to show that U.S. companies that select the law of a U.S. state to govern their international supply agreements generally do not intend for these contracts to be governed by the CISG.

## 2. THE EXISTING EMPIRICAL LITERATURE

On April 11, 1980, representatives of sixty-two nations voted unanimously to approve the text of the United Nations Convention on Contracts for the International Sale of Goods.<sup>14</sup> This vote marked the culmination of more than twelve years of drafting work conducted under the auspices of the United Nations Commission on International Trade Law (UNCITRAL).<sup>15</sup> The treaty outlined uniform rules relating to contract formation, the statute of frauds, anticipatory breach, damages, and other substantive rules

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<sup>13</sup> See also Peter L. Fitzgerald, *The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the Unidroit Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States*, 27 J.L. & COM. 1, 25 (2008) (arguing that the CISG is “still largely unknown and seldom seen in practice today.”).

<sup>14</sup> JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 3 (3d ed. 1999).

<sup>15</sup> See *id.* at 9–10 (describing the draft process organized by UNCITRAL, which culminated in a final draft finalized by 62 states and eight international organizations in March 1980).



of contract law that would apply to international sales agreements. When the CISG entered into force on January 1, 1988, it had been ratified by eleven nations, including the United States. As of December 2016, the CISG had been ratified by eighty-five nations.<sup>16</sup> Significantly, the list of ratifying countries includes nations from all corners of the world and nations at all levels of economic development.

In the many scholarly books and articles written about the CISG over the past several decades, the treaty is typically described as a resounding success story across three specific dimensions.<sup>17</sup> First, scholars praise the text of the treaty for providing clear legal rules that may be easily understood by attorneys from many different legal traditions.<sup>18</sup> Second, scholars note that the CISG repre-

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<sup>16</sup> UNCITRAL, Status on CISG, *supra* note 5 (listing ratifying nations).

<sup>17</sup> See generally Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988–1994*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 51, 77 (Cornell Int'l Law Review ed., 1995) (“The CISG seems to be well on the way to becoming the Magna Carta of international trade.”); Volker Behr, *The Sales Convention in Europe: From Problems in Drafting to Problems in Practice*, 17 J.L. & COM. 263, 264 (1998) (“From the point of view of legislation as well as from the point of view of practical application, the Convention seems to be a success.”); Ronald A. Brand & Harry M. Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & COM. 239, 239 (1993) (“The acceptance of the rules of CISG by nations with widely-differing domestic legal systems located on every inhabited continent holds the promise of a quantum jump in the uniformity of legal rules governing sales transactions, with significant benefits for international trade.”); Michael P. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, 37 VA. J. INT'L L. 1, 6 (1996) (“It can be said with little risk of overstatement that the [CISG] represents one of history’s most successful efforts at the unification of the law governing international transactions.”) (footnote omitted); Schwenger & Hachem, *supra* note 11, at 478 (“All in all the story of the CISG has been one of worldwide success. Criticism that has been put forward can largely be either rejected as unfounded to begin with or met by a correct interpretation of the Convention.”).

<sup>18</sup> See Joseph M. Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 AM. J. COMP. L. 403, 404 (1991) (stating that the CISG is “‘relatively straightforward and uncluttered with detail,’ not only because domestic anachronisms [sic] have been refined away, but also because some unsightly loose ends were tucked under the rug.”) (footnotes omitted) (quoting JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 69 (1st ed. 1982)); HONNOLD, *supra* note 14, at 8 (praising skill and dedication of UNCITRAL Secretariat, who aids with “analyzing the divergences among the existing legal rules; reports on commercial practices to assist in making a choice among alternative solutions to pivotal [sic] factual examples; draft statutory texts formulated, at crucial spots, with clearly labelled alternatives to facilitate debate and decision with a minimum of confusion or misunderstanding.”); Cook, *supra* note 3, at 345 n.12 (“UNCITRAL skillfully executed its plan of drafting a sales convention based upon input from all interest

sents a solution to choice-of-law problems that had long bedeviled national courts.<sup>19</sup> By harmonizing the substantive international law of sales, the CISG largely eliminated the need for a national court to conduct a choice-of-law analysis in cases involving international sales.<sup>20</sup> Third, scholars cite the number of ratifications to date as evidence of the CISG's success.<sup>21</sup> It was and remains quite rare for a commercial law treaty to gain such widespread acceptance in the international community.<sup>22</sup>

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groups.”).

<sup>19</sup> See Paul Schiff Berman, *The Inevitable Legal Pluralism Within Universal Harmonization Regimes: The Case of the CISG*, 21 UNIFORM L. REV. 1, 2 (2016) (“To its backers, the CISG addresses intractable problems of legal uncertainty and forum shopping, creating a stable global law of trade.”); John F. Coyle, *Rethinking the Commercial Law Treaty*, 45 GA. L. REV. 343, 345 (2011) (discussing the problem of legal uncertainty in international transactions) (footnote omitted).

<sup>20</sup> See Henry Mather, *Choice of Law for International Sales Issues Not Resolved by the CISG*, 20 J.L. & COM. 155, 155 (2001) (observing that the CISG “should substantially reduce the need for choice of law by American courts.”); see also John Felemegas, *Introduction*, in AN INTERNATIONAL APPROACH TO THE INTERPRETATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) AS UNIFORM SALES LAW 1, 4 (John Felemegas ed., 2007) (“A uniform law would provide parties with greater certainty as to their potential rights and obligations. This is to be compared with the results brought about by the amorphous principles of private international law and the possible application of an unfamiliar system of foreign domestic law.”) (footnote omitted). Where a contract dispute turns on issues outside of the ambit of the CISG, of course, it will still be necessary for a national court to engage in a choice-of-law analysis with respect to those issues. See CISG art. 4(a).

<sup>21</sup> See del Pilar Perales Viscasillas, *Contract Conclusion under CISG*, 16 J.L. & COM. 315, 315 (1997) (“This wide acceptance on the part of states with different social, legal, and economic systems demonstrates the considerable success achieved by the Convention.”); see also Alejandro M. Garro, *Perspectives, Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT’L LAW. 443, 482 (1989) (“UNCITRAL’s success in adopting a Convention with wider acceptability is evidenced by the fact that the original eleven States for which the Convention came into force . . . included countries from every geographical region, every stage of economic development, and every major legal, social, and economic system.”); Cook, *supra* note 3, at 349 (“CISG has been a tremendous international success: . . . it has been accepted by fifty Contracting States as the law that governs the international sale of good.”) (footnote omitted); Schroeter, *supra* note 12, at 649 (observing CISG has been ratified by fifteen of the world’s twenty leading exporters and is “the law applicable to 75% of the world’s exports and imports . . .”) (footnote omitted).

<sup>22</sup> Only a few commercially important nations, including the United Kingdom, India, and Taiwan, have declined to ratify the CISG. In the annals of international commercial law, only the New York Convention, which addresses the topic of international commercial arbitration, has been ratified by more nations than the CISG.

All of these accolades are entirely deserved. The CISG *is* an impressive feat of legal draftsmanship. The CISG *does* offer a potential solution to perennial problem of indeterminate choice-of-law rules. And the CISG *has* been ratified by a remarkable number of nations. All too often, however, scholarly accounts fail to mention perhaps the most important metric for evaluating the success of the CISG: whether contracting parties actually *use* it in their private transactions. On this metric, the evidence of the CISG's success is less clear cut.<sup>23</sup>

In order to understand why widespread ratification of the CISG may not automatically translate into widespread usage by private parties, it is useful to review the rules that determine when the CISG will and will not supply the governing law in private sales contracts. By its terms, the CISG applies to (1) contracts for the sale of goods between (2) parties whose places of business are in different nations when (3) at least one of the nations in question has ratified the CISG.<sup>24</sup> It is possible, however, for parties to opt out of the CISG.<sup>25</sup> If the parties exclude the CISG by writing a clause to that effect into their contracts, the treaty will not supply the governing law. In such cases, the contract will be governed by the national sales law selected by the parties or, if no such law is selected, then by the national sales law chosen after the court performs a choice-of-law analysis. This ability of private parties to opt out of the CISG means that looking solely to whether a country has ratified the CISG is an imperfect proxy for determining the extent to which the CISG is used by private actors. One must also inquire as to whether these parties regularly exercise their rights under the CISG to exclude that treaty as a source of law.

In recent years, a number of scholars have sought to determine how frequently contracting parties choose to exclude the CISG from their international sales contracts by conducting surveys of

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<sup>23</sup> Jan M. Smits, *Problems of Uniform Laws*, in INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 605, 607 (Larry A. DiMatteo ed., 2014) (“[I]n every case in which a party is aware of the existence of the CISG and its potential applicability to the contract, there is an empirical test of its usefulness.”).

<sup>24</sup> See CISG art. 1. The United States has made a declaration under article 95 of the CISG stipulating that it will only apply to contracts involving a U.S. party where *both* of the nations have ratified the CISG. See *infra* note 63.

<sup>25</sup> Article 6 of the CISG provides that “[t]he parties may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions.” CISG art. 6.

practicing attorneys.<sup>26</sup> In the United States, for example, three surveys conducted between 2004 and 2007 found that between 55% and 71% of U.S. attorneys typically advised their clients to opt out of the CISG.<sup>27</sup> In Germany, two surveys conducted in 2004 found that between 45% and 73% of German attorneys usually recommended that their clients opt out.<sup>28</sup> In Austria, a survey conducted in 2007 found that 55% of Austrian attorneys typically recommended opting out.<sup>29</sup> In Switzerland, a survey conducted in 2008 found that 62% of Swiss attorneys recommend opting out at least some of the time.<sup>30</sup> In China, by contrast, a survey conducted in 2007 found that only 37% of Chinese attorneys typically urged their clients to opt out of the CISG.<sup>31</sup> Taken as a whole, these surveys suggest that more than half of the attorney respondents in a number of important commercial jurisdictions routinely counsel their clients to exclude the CISG from their international sales contracts.<sup>32</sup>

In late 2009, UNCITRAL provided logistical support for a re-

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<sup>26</sup> For a thorough overview of the empirical data on this topic, see LISA SPAGNOLO, *CISG EXCLUSION AND LEGAL EFFICIENCY* 150–52, 212–18 (2014) (comparing surveys from 2008 and 2011 on CISG international rates of exclusion that indicate downward trend in automatic CISG exclusion rates).

<sup>27</sup> See Martin F. Koehler & Guo Yujun, *The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems*, 20 PACE INT'L L. REV. 45, 46–48 (2008) (explaining how 2004–2005 surveys conducted with U.S. practitioners indicated that 55.6% “mostly explicitly excluded” the CISG from their contracts); George V. Philippopoulos, *Awareness of the CISG Among American Attorneys*, 40 UCC L.J. 357, 361, 363 (2008); Fitzgerald, *supra* note 13, at 67 tbl.11 (showing 55% of U.S. practitioners “[s]pecifically opt out of applying the CISG to the transaction”).

<sup>28</sup> SPAGNOLO, *supra* note 26, at 151 n.6.

<sup>29</sup> *Id.* at 151.

<sup>30</sup> Corinne Widmer & Pascal Hachem, *Switzerland*, in *THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS* 281, 285 (Franco Ferrari ed., 2008). That same survey found that Swiss attorneys were five times more likely to exclude the CISG than to select it. *Id.*

<sup>31</sup> See Koehler & Guo, *supra* note 27, at 50 (“The second most often selected reason in China [for exclusion] was ‘because it is not possible to dissuade our business partners or the business partners of our client from the application of their national law’”) (alteration in original); see also SPAGNOLO, *supra* note 26, at 215 n.176.

<sup>32</sup> There is evidence that some contracts between Japanese chemical companies and their U.S. counterparties exclude the CISG. See Yoshimochi Taniguchi, *Deepening Confidence in the Application of CISG to the Sales Agreements Between the United States and Japanese Companies*, 12 RICH. J. GLOBAL L. & BUS. 277, 279 (2013) (“[I]n most [U.S.–Japanese] contracts, the CISG was excluded due to concerns about how the CISG would be interpreted and/or incompatibility with U.S. or Japanese law or both.”).

search project that became known as the Global Sales Law survey.<sup>33</sup> The survey invited approximately 9,000 people from around the world to respond to an online survey.<sup>34</sup> These individuals were drawn from four target groups, including practicing attorneys, arbitrators, businesses engaged in trade, and law professors, and those who responded to the survey were located in eighty-eight different countries.<sup>35</sup> The survey ultimately generated 640 responses, eighty-five of which came from the United States, that shed light on global practice as it relates to CISG exclusions.<sup>36</sup> The survey found 12% of U.S. respondents “always” opted out, 42% “sometimes” opted out, and 46% “never or rarely” opted out.<sup>37</sup> The numbers for respondents across all CISG member states were 13% “always” opting out, 32% “sometimes” opting out, and 55% “never or rarely” opting out.<sup>38</sup> The Global Sales Law survey suggests, therefore, that: (1) approximately 45% of all respondents sometimes or always chose to exclude the CISG from their contracts; and (2) this number jumps to 54% when one looks exclusively at respondents within the United States.

Why do so many attorneys across so many jurisdictions advise their clients to exclude the CISG? Scholars have advanced a number of possible explanations. First, there is the problem of lack of familiarity.<sup>39</sup> Attorneys are more likely to be familiar with their own national sales law than they are with an international treaty and, consequently, are more likely to recommend that their clients choose to have their contracts governed by the law they know best.<sup>40</sup> Second, and relatedly, many attorneys will never have oc-

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<sup>33</sup> See INGBORG SCHWENZER, PASCAL HACHEM & CHRISTOPHER KEE, GLOBAL SALES AND CONTRACT LAW 70 (2012) (“The Global Sales Law survey was conducted online towards the end of 2009 and was supported by the United Nations Commission on International Trade Law (UNCITRAL). The survey was conducted in the six UN languages.”) (footnote omitted).

<sup>34</sup> *Id.*

<sup>35</sup> See *id.* (“Approximately 5,000 individuals received personally addressed letters in United Nations envelopes, and there were four target groups—practising [sic] lawyers, arbitrators, businesses engaging in trade, and law schools.”).

<sup>36</sup> See *id.* (“The survey website received more than 1,500 hits and 640 useable responses.”) (footnote omitted); *id.* at 70 n.23 (listing number of responses from each jurisdiction).

<sup>37</sup> *Id.* at 73.

<sup>38</sup> *Id.*

<sup>39</sup> See SPAGNOLO, *supra* note 26, at 152–55.

<sup>40</sup> See *id.* at 153. Some scholars have argued that attorneys who advise their clients to exclude the CISG on lack of familiarity grounds are in breach of their

casation to litigate or arbitrate a case in which the CISG provides the governing law.<sup>41</sup> Given this reality, it is rational for these attorneys not to invest substantial time and energy into educating themselves as to the CISG's content, which in turn makes it more likely that they will recommend that their clients exclude it from their sales contracts.<sup>42</sup>

Third, some legal scholars in the United States have argued that the substantive content of the CISG does a poorer job than does the Uniform Commercial Code (UCC) at approximating the unstated preferences of the parties, and is therefore a relatively less efficient set of default rules.<sup>43</sup> To the extent that practicing attorneys share these views, they may urge their clients to avoid the CISG. Finally, some U.S. contracting parties may prefer the UCC to the CISG not because they view it as substantively superior but because they believe that it will give them a "home field" advantage.<sup>44</sup> On this account, a company may use its superior bargaining power to insist upon the application of a particular set of national legal rules precisely because these rules are unfamiliar to their foreign counterparty.<sup>45</sup> In the event that the parties wind up in litigation or arbitration, the party who dictated the choice of law will, by virtue of its attorneys' long familiarity with that law, be better positioned to prevail or to extract a more favorable settlement.

Whatever the precise reasons as to why attorneys often recommend that their clients opt out of the CISG, the survey evidence discussed above suggests that this practice is widespread. There are, however, at least two reasons to be cautious about relying too extensively upon this survey data.

First, the sample sizes for many of these surveys are quite small. One published survey of attorney attitudes about the CISG,

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ethical obligations. See William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL EDUC. 72, 74–75 (2000) (discussing a contract dispute where counsel failed to timely raise possible winning argument on the applicability of CISG). One reason why U.S. attorneys may be generally unfamiliar with the CISG is that many U.S. law students are not adequately exposed to it as part of their legal training. See John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433, 467–68 (2015) (discussing general lack of exposure to international law among American attorneys, judges, and law students).

<sup>41</sup> See SPAGNOLO, *supra* note 26, at 155–64.

<sup>42</sup> See *id.* at 158–64.

<sup>43</sup> See *id.* at 168; see also *id.* at 168–73.

<sup>44</sup> See *id.* at 166–68.

<sup>45</sup> See *id.* at 166–67.

for example, received responses from only twenty-seven attorneys in China, thirty-three attorneys in Germany, and fifty attorneys in the United States.<sup>46</sup> Given the absolute number of attorneys in each of these jurisdictions—approximately 200,000, 138,000, and 1.26 million, respectively—it is not clear that these sample sizes are large enough to accurately represent the views of the entire attorney population. Even the Global Sales Law survey, the most ambitious global survey on this topic to date, elicited responses from only eighty-five respondents in the United States.

Second, all of the above-cited surveys must grapple with methodological issues, including response bias, non-response bias, and self-selection bias, that may render survey evidence unreliable. There is the possibility that survey respondents will give answers that they believe the questioner wants to hear (response bias).<sup>47</sup> There is the possibility that certain types of potential respondents, such as attorneys who are generally unfamiliar with the CISG, will simply decline to respond to the survey (non-response bias).<sup>48</sup> And there is the possibility that individuals who are wildly enthusiastic about the CISG, or who intensely dislike it, will take the time to complete the survey when others do not (self-selection bias).<sup>49</sup>

This is not to suggest, of course, that all of the published surveys to date are unreliable. Nor is it to suggest the surveys themselves serve no purpose or provide no useful information. It is merely to point out the potential advantages of seeking to answer the same basic question—how often contracting parties choose to

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<sup>46</sup> Koehler & Yujun, *supra* note 27, at 46–47; see also Michael Wallace Gordon, *Part II - Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges*, 46 AM. J. COMP. L. 361, 362–64 (1998) (presenting survey data on Florida legal community's experience with CISG without providing the sample size).

<sup>47</sup> See Zev J. Eigen & Yair Listokin, *Do Lawyers Really Believe Their Own Hype and Should They?: A Natural Experiment*, 41 J. LEGAL STUD. 239, 250–51 (2012) (discussing problem of response bias in surveys). In the context of the CISG, for example, respondents may shy away from reporting that they “always” exclude it out of a fear of offending a research team that clearly thinks that the treaty is important enough to warrant conducting a survey relating to it.

<sup>48</sup> See Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-1991*, 68 AM. BANKR. L.J. 121, 150–51 (1994) (discussing the problem of non-response bias in surveys).

<sup>49</sup> See Rachel F. Moran, *Diversity and its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2273–74 (2000) (discussing problem of self-selection bias in surveys).

make use of the CISG when contracting—via a methodological approach other than surveys of practicing attorneys.

### 3. USING ACTUAL CONTRACTS TO UNDERSTAND CISG PRACTICE

If the goal is to ascertain the role played by the CISG in contemporary contracting practice without resorting to surveys, an alternative approach is to look to the text of actual international sales contracts. Although these contracts are generally not available to the public, there is at least one public repository that contains hundreds of thousands of private contracts. This is the Electronic Data Gathering, Analysis, and Retrieval system (“EDGAR”) maintained by the Securities and Exchange Commission in the United States.<sup>50</sup> This Part first describes how I went about assembling a dataset of contracts that reference the CISG from this database. It then describes the advantages and disadvantages to using these contracts, as opposed to attorney surveys, to gain insight into CISG contracting practice.

#### 3.1. *Assembling the Dataset*

In the United States, companies that sell securities to significant numbers of non-professional investors are required by law to register with the Securities and Exchange Commission (“SEC”).<sup>51</sup> Thereafter, these companies are periodically required to file certain information about their business and finances with the SEC. Among other duties, each reporting company is required to file with the SEC any “material contract” to which it is a party.<sup>52</sup> This

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<sup>50</sup> Other scholars have also relied on the EDGAR database to gain insight into party practice as it relates to choice of law. See, e.g., Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1488 n.61 (2009); Sarath Sanga, *Choice of Law: An Empirical Analysis*, 11 J. EMPIRICAL LEGAL STUD. 894, 902–03 (2014).

<sup>51</sup> See 15 U.S.C. § 781(g) (2012) (requiring companies that have sold securities to the public to file “a registration statement . . . with respect to such security containing such information and documents as the Commission may specify”).

<sup>52</sup> See 17 C.F.R. § 229.601(b)(10) (2016) (listing criteria for determining whether a contract is “material”); see also Valerie Ford Jacob et al., *The New Form 8-K: Fif-*



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requirement is significant because it means that the SEC has in its possession a massive repository of private contracts that would otherwise be kept hidden from public view.<sup>53</sup> These contracts are accessible online through the EDGAR database.

I worked with a team of research assistants to comb through the EDGAR database in search of contracts that referred to the CISG. In order to identify contracts that reference this treaty, we performed a search for the term “international sale of goods” in EDGAR Online.<sup>54</sup> When we performed a search for this phrase in all SEC documents filed between January 1, 1988, and December 31, 2014, the search generated 6,911 hits.<sup>55</sup> In 105 instances, the phrase “international sale of goods” was not used to refer to the CISG. These documents were excluded from the dataset. In the remaining 6,806 instances in which the phrase was used, it was contained in a contract that referred to the CISG. There were, however, a significant number of instances in which the same contract appeared multiple times in the dataset. After the duplicates were removed, there were 5,092 contracts remaining. This group of 5,092 unique contracts constitutes the primary dataset of contracts analyzed in this Article.<sup>56</sup> This group includes a wide range of contract types and is not comprised exclusively of international sales agreements; any contract that referenced the CISG was included.

Once the dataset was created, I again worked with a team of research assistants to review the contracts within it in an attempt to answer a number of questions. Most significantly, we sought to discover whether these contracts generally referred to the CISG in

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*teen Items Every General Counsel Needs to Know*, 60 CONSUMER FIN. L.Q. REP. 42, 43 (2006) (discussing disclosure requirement for material amendments to material contracts).

<sup>53</sup> The overwhelming majority of private contracts are, of course, kept under lock and key by parties who have no reason to make public the details of their private business arrangements.

<sup>54</sup> This phrase was chosen because our initial forays into the database revealed that parties referred to the CISG in many different ways. In almost every instance, however, the formulation utilized by the parties contained the phrase “international sale of goods.”

<sup>55</sup> The SEC did not mandate that all public companies submit their filings through EDGAR until May 6, 1996. The earliest dated contract that referenced the CISG was filed on January 21, 1994.

<sup>56</sup> One recent study found that a total of 705,669 unique material contracts were filed with the SEC between 1996 and 2012. See Sanga, *supra* note 50, at 903.

order to *exclude* it as a source of governing law or to *choose* it as a source of governing law. The goal was to obtain a better sense of the role that the CISG played in these agreements and to determine whether there had been any changes in CISG contract practice over time.

We also coded a subset of these contracts—those in which the CISG was affirmatively selected as the governing law—for a number of other variables, including the nationality of the buyer and seller, the industry of the filing company, the type of contract at issue, and the type of goods being sold. This information made it possible to draw more general conclusions about which companies were most likely to choose the CISG to govern their contracts. The goal was to determine whether there were any pockets of support for the CISG within the United States and elsewhere. With this same end in mind, I also sent letters to all of the U.S. companies and many of the foreign companies that had affirmatively chosen the CISG to govern their agreements to inquire as to why they had made this choice.

### 3.2. *Benefits and Drawbacks*

There are a number of virtues in the methodological approach outlined above. First, the dataset contracts constitute a historical record that cannot be changed or misremembered. In this respect, they may be a more reliable indicator of party practice than the recollections of attorneys responding to a survey. Second, it is easier to review thousands of documents than it is to obtain survey responses from thousands of people. A contract-based approach thus makes it possible to draw upon a larger sample size while at the same time reducing the likelihood that response bias, non-response bias, or self-selection bias will influence the results. Third, these contracts contain a host of other data, such as the industry and nationality of the buyer and seller to specific agreements, that can provide useful context for the underlying decision to select or to exclude the CISG as a source of law. The availability of this contextual data makes it possible to paint a deeper and richer portrait of CISG practice than would be possible through survey data alone.

There are, however, a number of drawbacks to relying upon a review of contracts to gain insight into CISG practice. First and

foremost, there is the problem of selection bias. Every single contract in the EDGAR dataset is a *material* contract that was filed with the SEC by a *public* company. In other words, the universe of contracts examined as part of this project consisted exclusively of important agreements filed by companies that are disproportionately larger and wealthier than the typical company. In addition, public companies that enter into high-stakes contracts are more likely to be concerned about legal uncertainty than are smaller companies entering into low-stakes contracts. To the extent that national law is viewed as providing a more predictable legal framework than the CISG, the dataset contracts are likely to contain a greater proportion of opt outs than in the contract population as a whole. In other words, given the limitations on the contracts available, a review of these and only these contracts may not paint an accurate portrait of contracting practice in the aggregate.<sup>57</sup>

Second, one might argue that there are two purposes for rules of uniform international sales law: (1) to provide uniform law to be chosen by the parties; and (2) to provide uniform law as default rules when no choice is made. A contract review of the type undertaken in this Article only addresses the first of these purposes. It may be that the second purpose, which focuses on litigation rather than transactional planning, is reason enough by itself to validate the CISG. The widespread ratification of the CISG has allowed national courts in many countries to avoid difficult choice-of-law analyses in the context of domestic litigation. It has also enabled national judges to apply the (relatively more familiar) CISG in cases in which they would otherwise have had to apply the (relatively less familiar) law of a foreign jurisdiction. Therefore, to the extent this Article is focused primarily on transactional planning as manifested in contract drafting, it may fail to fully account for other benefits that may flow from the widespread ratification of the CISG in situations involving oral contracts or written contracts that lack a choice-of-law provision.<sup>58</sup>

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<sup>57</sup> The critique that these contracts are not representative, however, cuts both ways. The contracts in the dataset were negotiated and drafted by individuals representing public companies. These companies can generally afford to hire high-quality legal counsel—the elite members of the U.S. bar—to specifically advise them on these agreements. If these elite attorneys regularly counsel their clients to opt out of the CISG, then this is a significant finding.

<sup>58</sup> See United Nations Comm'n on Int'l Trade Law, United Nations Convention on Contracts for the International Sale of Goods, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html) [<https://perma.cc/EYE3-QUHB>] (last visited Oct. 4, 2016) (“Small and medium-

Third, every contract in the primary dataset references the CISG in some way. Some reference the CISG to exclude it. Others reference the CISG in order to choose it. In both cases, the contract mentions the CISG by name. There are, by contrast, no contracts in the primary dataset that do not reference the CISG at all. This is potentially a problem because the CISG will apply to govern international sales contracts when the parties fail to mention it in at least two specific instances: (1) where the parties fail altogether to address the issue of choice of law; and (2) where the parties select the law of a particular U.S. state but do not reference the CISG.

In the first instance, where the parties fail to make any mention of governing law, the CISG will apply as a default rule so long as the contract is for the sale of goods, the parties' places of business are in different nations, and the nations in question have both ratified the CISG.<sup>59</sup> In cases such as these, it is difficult to know what the parties were thinking. On the one hand, it is possible that they knew the CISG would apply as a default rule and felt that there was no need to include a choice-of-law clause in the agreement. On the other hand, it is possible that the parties were entirely unaware of the CISG's potential applicability and assumed that the contract would be governed by national sales law. Since the only contracts selected for inclusion in the primary dataset are those that specifically reference the CISG, this dataset will have little to tell us about the preferences of those parties whose contracts failed altogether to address the question of choice of law.<sup>60</sup>

In the second instance, where the parties choose to have their contract governed by the law of a particular U.S. state but make no reference to the CISG, the CISG will also supply the governing law.

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sized enterprises as well as traders located in developing countries typically have reduced access to legal advice when negotiating a contract. Thus, they are more vulnerable to problems caused by inadequate treatment in the contract of issues relating to applicable law. The same enterprises and traders may also be the weaker contractual parties and could have difficulties in ensuring that the contractual balance is kept. Those merchants would therefore derive particular benefit from the default application of the fair and uniform regime of the CISG to contracts falling under its scope."); David P. Stewart, *Private International Law, the Rule of Law, and Economic Development*, 56 VILL. L. REV. 607, 610–11 (2011) ("In an increasingly interconnected world, the harmonization and codification functions of private international law assume ever-greater practical importance in promoting trade, commerce, and economic development.").

<sup>59</sup> See *supra* note 63 and accompanying text.

<sup>60</sup> A prior study found that approximately 89% of contracts on file in the EDGAR database contain choice-of-law clauses. Sanga, *supra* note 50, at 903.

At first glance, this may seem surprising. It is not obvious that a choice-of-law clause selecting the law of New York would result in the application of the CISG. Most U.S. courts have reasoned, however, that New York law necessarily includes all forms of federal law and that the CISG—as a properly ratified federal treaty—is therefore a part of the law of New York.<sup>61</sup> This interpretive rule necessarily presents a challenge to any attempt to gain insight into CISG contracting practice. On the one hand, parties may choose the law of New York to govern their contracts in full knowledge that this choice will result in the application of the CISG. On the other hand, parties may choose the law of New York without realizing that this choice amounts to an indirect selection of CISG.<sup>62</sup> If the parties truly want the CISG to govern their contract, then one would think that they would say as much by naming it in their agreement. There is, however, no requirement that they do so. This issue is addressed in Part 6.

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<sup>61</sup> See *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Tech. Fabrics Can. Ltd.*, 474 F. Supp. 2d at 1081–82. The practical effect of this line of cases is that even a choice-of-law clause expressly selecting “the laws of New York” or “the laws of California” that makes no reference to the CISG will generally result in the application of the CISG. See William P. Johnson, *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*, 59 *BUFF. L. REV.* 213, 248–59 (2011) (discussing U.S. case law on choice-of-law analysis when CISG is not excluded). By contrast, where the parties state that their contract is to be governed by the “New York Uniform Commercial Code,” then this formulation will typically be read to have excluded the CISG because it is logically impossible for both the CISG and the New York UCC to govern the same agreement.

<sup>62</sup> While there is some scattered evidence that the latter scenario is the more common one, there is no way to know for certain what the parties intend when they select national sales law as the law to govern their contract. See *Asante Tech., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001); see also Matthias Reimann, *The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care*, 71 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* [*RABEL J. COMP. INT’L PRIV. L.*] 115, 120–23 (2007) (considering “fundamental ignorance,” “illicit avoidance,” and “conscious exclusion” as reasons for lack of CISG litigation in U.S. courts); Coyle, *supra* note 19, at 370–83 (discussing studies and data concerning the CISG and challenging the assertion that national actors perceive the CISG to be superior to national commercial law).

#### 4. SOME OBSERVATIONS ABOUT U.S. CONTRACT PRACTICE AS IT RELATES TO THE CISG

A comprehensive review of the contracts in the primary dataset supports a number of general observations about the nature of U.S. contract practice as it relates to the CISG. Significantly, the picture that emerges from this review paints a very different and more pessimistic picture of U.S. practice than the one painted by the existing survey evidence. These contracts suggest that: (1) U.S. companies routinely exclude the CISG from contracts to which it would not otherwise apply; (2) the number of U.S. companies that select the CISG to govern their contracts is small and declining; (3) the CISG lacks broad support within any industry or geographic region within the United States; and (4) some companies that had selected the CISG in the past now have a policy of excluding it from their contracts.

##### *4.1. U.S. Companies Routinely Exclude the CISG from Contracts to Which It Would Never Apply*

The CISG, by its terms, applies exclusively to contracts for the sale of goods where the contracting parties have their places of business in different countries and both of the countries in question have ratified the CISG.<sup>63</sup> It follows, therefore, that there is no need for the parties to exclude the CISG when: (1) the contract does not involve the sale of goods; (2) the parties have their places of busi-

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<sup>63</sup> The CISG states that it may supply the governing law where only one contracting party has its place of business in a country that has ratified the CISG and "the rules of private international law lead to the application of the law of [the ratifying nation]." CISG art. 1(1)(b). However, Article 95 of the CISG allows a nation to make a reservation at the time that it ratifies the CISG, stating that it will not be bound by Article 1(1)(b). See CISG art. 95. The United States has made an Article 95 declaration. See *Impuls I.D. Internacional, S.L. v. Psion-Teklogix Inc.*, 234 F. Supp. 2d 1267, 1272 (S.D. Fla. 2002) ("The United States specifically rejected being bound by subparagraph (1)(b)."). Consequently, the CISG will only apply to contracts involving U.S. parties when the foreign counterparty has its place of business in a country that has also ratified the CISG. Cf. *Prime Start Ltd. v. Maher Forest Prods. Ltd.*, 442 F. Supp. 2d 1113, 1118 (W.D. Wash. 2006) ("Because not all parties are from countries that signed the CISG, the CISG cannot apply to this dispute, even if a traditional choice-of-law analysis leads to the application of the law of the United States (or one of its states) or any other signatory State. Accordingly, some body of law other than the CISG will govern this dispute.").

ness in the same country; or (3) one of the parties hails from a country that has not ratified the CISG. A review of the U.S. contracts in the dataset, however, suggests that companies routinely exclude the CISG from contracts in each of these situations.

First, it is common for U.S. companies to exclude the CISG from wholly domestic contracts. A biodiesel purchase agreement between a Tennessee buyer and an Iowa seller.<sup>64</sup> A distribution agreement between a New Mexico seller and a Michigan buyer.<sup>65</sup> A manufacturing and supply agreement between a Pennsylvania manufacturer and a California buyer.<sup>66</sup> A patent license agreement between two California companies.<sup>67</sup> In each of these contracts, the parties excluded the CISG. In each case, however, the exclusion was unnecessary because the CISG only applies where the parties have their places of business in different countries.

Second, there are a number of dataset contracts where the CISG is excluded from a contract involving a foreign counterparty whose home country has not ratified the CISG. A manufacturing and supply agreement between a California company and an Irish company.<sup>68</sup> A distribution agreement between a California company and an English company.<sup>69</sup> A manufacturing and supply agreement between a North Carolina company and an Indian

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<sup>64</sup> *E.g.*, Pilot Travel Centers LLC, Biodiesel Purchase Agreement with REG Mktg. and Logistics Grp. (Form 10-Q) Exhibit 10.1 (May 9, 2014), <https://www.sec.gov/Archives/edgar/data/1463258/000144530514002070/regi-2014q1xex101.htm> [<https://perma.cc/4XGL-LE58>].

<sup>65</sup> *E.g.*, Enerpulse Techs., Inc., Distribution Agreement with Green Bridge Technologies LLC (Form 8-K) Exhibit 10.1 (Nov. 7, 2014), [https://www.sec.gov/Archives/edgar/data/1495899/000114420414065901/v393592\\_ex10-1.htm](https://www.sec.gov/Archives/edgar/data/1495899/000114420414065901/v393592_ex10-1.htm) [<https://perma.cc/HY9N-YD5W>].

<sup>66</sup> *E.g.*, Relypsa, Inc., Manufacturing and Supply Agreement Between Lanxess Corporation and Relypsa, Inc. (Form 10-K) Exhibit 10.6 (Mar. 19, 2014), <https://www.sec.gov/Archives/edgar/data/1416792/000119312514104575/d678553dex106.htm> [<https://perma.cc/ZA84-VD3L>].

<sup>67</sup> *E.g.*, Landmark Infrastructure Partners LP, Patent License Agreement with American Infrastructure Funds, LLC (Form S-11/A) Exhibit 10.7 (Oct. 30, 2014) [https://www.sec.gov/Archives/edgar/data/1615346/000104746914008674/a2221760zex-10\\_7.htm](https://www.sec.gov/Archives/edgar/data/1615346/000104746914008674/a2221760zex-10_7.htm) [<https://perma.cc/J27N-3S9E>].

<sup>68</sup> *E.g.*, Zogenix, Inc., Manufacturing and Supply Agreement with Endo Ventures Limited (Form 10-Q) Exhibit 10.2 (Aug. 6, 2014) <https://www.sec.gov/Archives/edgar/data/1375151/000137515114000006/ex102-2014630.htm> [<https://perma.cc/V8ME-TVTW>].

<sup>69</sup> *E.g.*, Therapeutic Sols. Int'l, Inc., Distribution Agreement with S4S (UK) Limited (Form 8-K) Exhibit 10.1 (June 18, 2013) [https://www.sec.gov/Archives/edgar/data/1419051/000107878213001228/f8k061713\\_ex10z1.htm](https://www.sec.gov/Archives/edgar/data/1419051/000107878213001228/f8k061713_ex10z1.htm) [<https://perma.cc/HDE7-7648>].

company.<sup>70</sup> A supply agreement between an Ohio company and a Taiwanese company.<sup>71</sup> In each case, again, the contract in question excluded the CISG. In each case, again, these exclusions were unnecessary because the CISG only applies where each of the parties has its principal place of business in a country that has ratified the CISG and, to date, neither Ireland nor England nor India nor Taiwan has done so.<sup>72</sup>

Third, and finally, there are hundreds of dataset contracts in which the parties opted out of the CISG even though the contract in question did not involve the sale of goods.<sup>73</sup> A share purchase agreement.<sup>74</sup> A registration rights and stockholder agreement.<sup>75</sup> A master services agreement.<sup>76</sup> An aircraft purchase agreement.<sup>77</sup> It is unnecessary to exclude the CISG from these contracts because none of them involve the sale of “goods” as that term is defined by the CISG. The dataset is, however, replete with such agreements in which the CISG is excluded.

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<sup>70</sup> E.g., Cempra Pharm., Inc., API Manufacturing and Supply Agreement with Wockhardt Ltd. (Form 10-K) Exhibit 10.11 (Mar. 7, 2013) <https://www.sec.gov/Archives/edgar/data/1461993/000119312513096011/d445006dex1011.htm> [<https://perma.cc/TL2R-TQJR>].

<sup>71</sup> E.g., PECO II, Inc., Supply Agreement with Delta Electronics, Inc. (Form 8-K) Exhibit 10.1 (May 22, 2009) <https://www.sec.gov/Archives/edgar/data/845072/000111650209000863/peco101.htm> [<https://perma.cc/M3X8-4LWU>].

<sup>72</sup> See UNCITRAL, Status on CISG, *supra* note 5 (listing nations that have ratified the CISG and making no mention of England, Ireland, India, or Taiwan). Hong Kong was coded as being a party to the CISG notwithstanding disagreement on this issue among U.S. courts. See *infra* note 84 (discussing U.S. case law relating to the status of Hong Kong under the CISG).

<sup>73</sup> See CISG art. 2(d) (stating that the CISG shall not apply to contracts for the sale of “stocks, shares, investment securities, negotiable instruments or money”).

<sup>74</sup> E.g., Sumitomo Heavy Indus. & Axcelis Techs., Inc., Share Purchase Agreement with Sen Corporation, An Shi and Axcelis Co. (Form 8-K) Exhibit 10.1 (Feb. 27, 2009) [https://www.sec.gov/Archives/edgar/data/1113232/000110465909012845/a09-6240\\_1ex10d1.htm](https://www.sec.gov/Archives/edgar/data/1113232/000110465909012845/a09-6240_1ex10d1.htm) [<https://perma.cc/5RAF-228Y>].

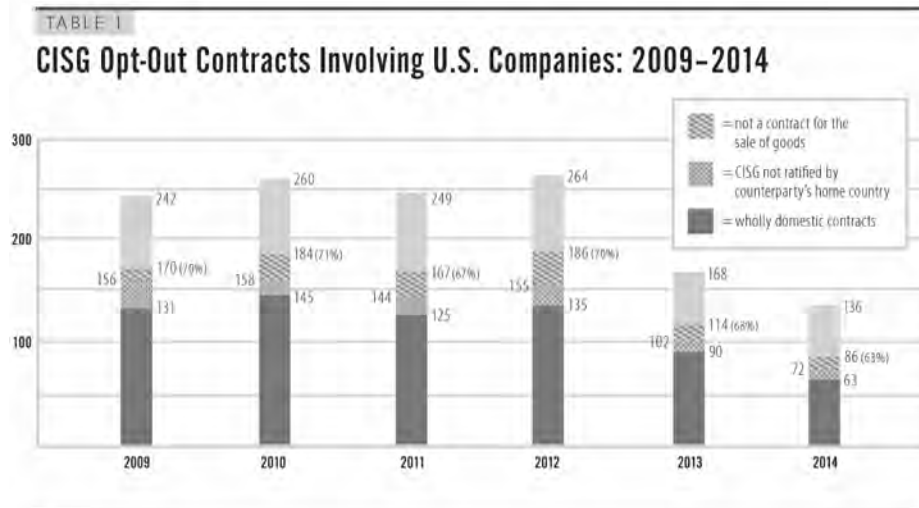
<sup>75</sup> E.g., Spectrum Pharm., Inc., Registration Rights and Stockholder Agreement with TopoTarget A/S (Form 10-K) Exhibit 4.2 (Mar. 12, 2014) <https://www.sec.gov/Archives/edgar/data/831547/000119312514094593/d640093dex42.htm> [<https://perma.cc/9C6T-6HFM>].

<sup>76</sup> E.g., State St. Bank & Tr. Co., Master Services Agreement with Each BTC Recipient Listed in Exhibit A, Exhibit 10.5 (July 1, 2013) <https://www.sec.gov/Archives/edgar/data/1535365/000119312513277818/d482189dex105.htm> [<https://perma.cc/3ACV-9BZZ>].

<sup>77</sup> See generally CISG art. 2(e) (stating that the CISG is not applicable to contracts for the sale of aircraft).



Collectively, the proportion of U.S. contracts in the dataset in which the CISG was unnecessarily excluded is significant, as illustrated by Table 1 below.<sup>78</sup>



Overall, approximately 69% of U.S. dataset contracts filed with the SEC between 2009 and 2014 that opted out of the CISG did so needlessly. It is, of course, common for attorneys to simply cut and paste language from one contract into another without considering whether that language is strictly necessary.<sup>79</sup> And there is certainly

<sup>78</sup> Table 1 was assembled in the following manner: First, I screened for U.S. contracts in the primary dataset that were wholly domestic. Once these contracts were identified and coded, they were set aside. Second, I screened the remaining contracts for agreements in which the counterparty's home country had not ratified the CISG. Once these contracts were identified and coded, they were also set aside. Finally, I screened those contracts that remained for agreements that were not for the sale of goods. The virtue of this approach was that no contract was counted more than once. The vice of this approach is that it resulted in the undercounting of contracts that were not for the sale of goods. Non-sales contracts between (1) two U.S. parties, and (2) a U.S. party and foreign counterparty whose home country has not ratified by the CISG, are not separately identified in Table 1.

<sup>79</sup> See MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* 93–94 (John M. Conley & Lynn Mather eds., 2013) (discussing the reasons for the practice of copying clauses in existing contracts and inserting them into new contracts without considering costs or benefits to client); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 723–24 (1997) (discussing potential benefits of using boiler-

no harm in excluding the CISG from contracts to which it would not otherwise apply. At the same time, the fact that just over two-thirds of these contracts opted out of the CISG when there was no need to do so suggests that the default position is to exclude the treaty from any and all contracts. This pattern of practice indicates that many U.S. companies reflexively exclude the CISG without inquiring as to whether it would apply of its own force.

#### 4.2. *The Number of U.S. Contracts That Affirmatively Choose the CISG is Tiny*

When a dataset contract references the CISG, it invariably does so either to *exclude* it or to *choose* it as the governing law. In 99% of the primary dataset contracts—5,028 out of 5,092—the parties refer to the CISG in order to exclude it. In just 1% of these agreements—61 contracts out of 5,092—the parties refer to the CISG to state that they want it to govern the agreement.<sup>80</sup> The number of contracts that affirmatively choose the CISG, moreover, appears to be on the decline. There were actually fewer contracts in which U.S. companies affirmatively chose the CISG as their governing law in 2014

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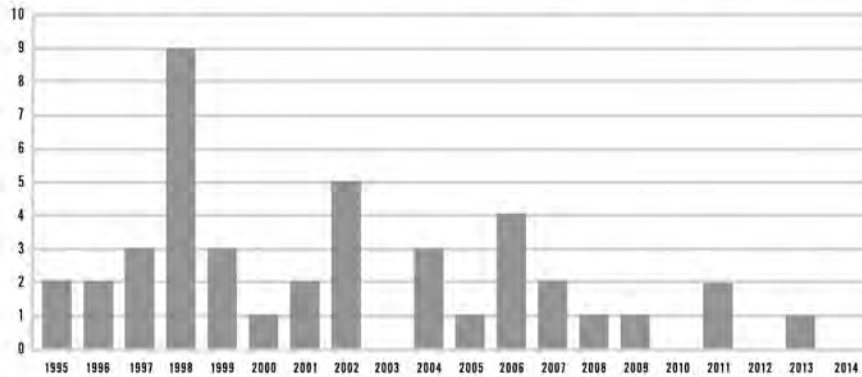
plate).

<sup>80</sup> Technically, the survey disclosed exactly sixty-four contracts in which the CISG was affirmatively chosen as the governing law, but in three cases the choice was nonsensical or obviously done in error. See *Auspex Sys., Inc., Auspex Systems, Inc. or Subsidiary Corporation (Herein "Auspex") Authorized Reseller Agreement between Auspex Systems, Inc., and Net Brains, Inc.* (Form 10-Q, Exhibit 10.1, ¶ 21) (Nov. 6, 2001), <https://www.sec.gov/Archives/edgar/data/860749/000089161801501949/f76765ex10-1.txt> [<https://perma.cc/BA6E-V62R>] (calling for disputes to be submitted to "either the American Arbitration Board or the United Nations (UN) Convention on contracts for the International Sale of Goods (CISG)"); *Interactive Telesis, Inc., Agreement for Services with AT&T Corporation (Exhibit 10)* (Apr. 21, 2000) (stating that agreement shall be governed by both the CISG and the Uniform Commercial Code); *Vantage Health, Inc., Director Retainer Agreement with William S. Rees, Jr.* (Form 8-K, Exhibit 10.2) (Dec. 19, 2013), <https://www.sec.gov/Archives/edgar/data/1497130/000149315213002742/ex10-2.htm> [<https://perma.cc/4BU4-SQK8>] (selecting CISG to govern a contract between a U.S. company and a U.S. director whose purpose was to compensate a director for his service on a corporate board). Within this subset of sixty-one contracts, nineteen were concluded between two foreign companies. This leaves exactly forty-two contracts out of a total dataset of 5,092 in which a U.S. company entered into a contract where the CISG was expressly chosen as the governing law.

than there were in 1995, as illustrated by Table 2.<sup>81</sup>

TABLE 2

### CISG Opt-In Contracts Involving U.S. Companies: 1995-2014



These findings are difficult to reconcile with claims advanced by some scholars that the CISG is gaining traction in the United States.<sup>82</sup> If the CISG were truly making inroads in the U.S. legal community, one would expect to see a gradual increase in the number of U.S. contracts in which it was affirmatively chosen as the governing law. The goal of any contract is, after all, to clearly express the intent of the parties. If the parties want the CISG to

<sup>81</sup> This Table omits the nineteen contracts from the dataset that were exclusively between foreign parties, which are discussed in Part 5. Consequently, there are forty-two contracts represented in Table 2. The 1998 spike of opt ins is attributable to a single Massachusetts company that entered into six separate contracts that chose the CISG in that year. That same company entered into two additional contracts that chose the CISG in 1996, which means that eight of the forty-two contracts listed in Table 2 were negotiated by a single company.

<sup>82</sup> See SPAGNOLO, *supra* note 26, at 167 (“Arguably, the studies of US lawyers . . . demonstrate a trend towards exclusions slowly decreasing.”); Harry M. Flechtner, *Changing the Opt-Out Tradition in the United States* 3–4 (Univ. of Pittsburgh Sch. of Law Legal Studies Research Paper Series, Working Paper No. 2010-10, 2010), <http://ssrn.com/abstract=1571281> [<https://perma.cc/2QPD-FAUD>] (suggesting that market forces are “altering the traditional practice of U.S. lawyers to advise their clients to opt out of the Convention in favor of the application U.S. domestic sales law”); see also *supra* notes 11–12 and accompanying text.

provide the governing law, it is not unreasonable to think that they would occasionally say as much in their agreement. In cases where one of the parties has more than one place of business, for example, and where one of these places of business is located in a nation that has not ratified the CISG, the parties may want to affirmatively select the CISG to make clear that they want it to govern the agreement.<sup>83</sup> Alternatively, if it is unclear as to whether the counterparty's home country is a party to the CISG—as is currently the case with Hong Kong—the parties may wish to select the CISG in order to remove all doubts as to their intent.<sup>84</sup> Parties entering into a distribution agreement may also want to affirmatively select the CISG as the governing law—if this is in fact their intent—because most courts have held that the treaty does not apply to distribution agreements.<sup>85</sup> Similarly, parties negotiating the rights to software

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<sup>83</sup> See CISG art. 1(2) (“The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.”); *id.* art. 10(a) (“If a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract . . .”).

<sup>84</sup> Compare *Am.'s Collectibles Network, Inc. v. Timlly (HK)*, 746 F. Supp. 2d 914, 920 (E.D. Tenn. 2010) and *Innotex Precision Ltd. v. Horei Image Prods., Inc.*, 679 F. Supp. 2d 1356, 1358–59 (N.D. Ga. 2009) (concluding that Hong Kong is not a party to CISG), with *Electrocraft Ark., Inc. v. Super Elec. Motors, Ltd.*, No. 4:09CV00318 SWW, 2009 WL 5181854, at \*3 (E.D. Ark. Dec. 23, 2009), and *CNA Int'l Inc. v. Guangdong Kelon Electronical Holdings*, No. 05 C 5734, 2008 WL 8901360, at \*6 (N.D. Ill. Sept. 3, 2008) (concluding that Hong Kong is a party to CISG).

<sup>85</sup> See, e.g., *Amco Ukrservice v. Am. Meter Co.*, 312 F. Supp. 2d 681, 687 (E.D. Pa. 2004) (holding CISG does not apply to distribution agreements); see also DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS* 182 (3d ed. 2015) (“[T]he general position of the courts [is] that the CISG does not apply to distribution agreements . . .”) (alteration in original) (citation omitted); JAMES M. KLOTZ, *INTERNATIONAL SALES AGREEMENTS: AN ANNOTATED DRAFTING AND NEGOTIATING GUIDE* 8 (2d ed. 2008) (“[A] distribution agreement has been held not to be a contract for the sale of goods, but rather to be a framework agreement that will govern future sales of goods. Thus, the CISG is not intended to apply to distribution agreements, and most courts considering the issue have come to this conclusion.”). This conclusion runs contrary to the prevailing view among U.S. courts that Article 2 of the UCC *does* apply to distribution agreements notwithstanding the fact that these agreements can and often do address matters unrelated to sales. See *Gruppo Esenziero Italiano, S.P.A. v. Aromi D'Italia, Inc.*, No. CCB–08–65, 2011 WL 3207555, at \*3 (D. Md. July 27, 2011) (“Although distributorship agreements are considered contracts for the sale of goods under Maryland’s Uniform Commercial Code (“UCC”), courts have held that such agreements are not considered contracts for

licenses may want to name the CISG as the governing law due to any lingering uncertainty as to whether software is a “good” to which CISG would apply automatically.<sup>86</sup> The consistent failure on the part of contracting parties to select the CISG as the governing law in any of these situations over the past two decades tends to undercut the argument that the CISG is becoming a more important part of contracting practice in the United States.

#### 4.3. *There Is No Clear Locus of Support for the CISG in the United States*

A review of the dataset contracts offers no evidence suggesting that the CISG has been embraced (1) in specific industries, (2) with respect to specific products, or (3) in specific geographic areas within the United States.<sup>87</sup> While those U.S. companies that have

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the sale of goods under the CISG.”); Gary L. Monserud, *The Privileges of Suretyship for Delegating Parties Under UCC Section 2-210 in Light of the New Restatement of Suretyship*, 37 WM. & MARY L. REV. 1307, 1394 (1996) (alternation in original) (“Distribution agreements, which, by their inherent nature, are relational rather than transactional contracts, are one such area being subjected to [UCC Article 2’s] dominion.”). Accordingly, if parties wanted the CISG to apply to their international distribution agreements, they would be well advised to say as much in their contract.

<sup>86</sup> See Douglas A. Hass, *A Gentlemen’s Agreement: Assessing the GNU General Public License and its Adaptation to Linux*, 6 CHI.-KENT J. INTELL. PROP. 213, 223–24 (2007) (discussing whether the CISG applies to software licenses). On the one hand, software is by its nature intangible and hence dissimilar from most other “goods.” On the other hand, software is often bought and sold on disks and other tangible objects, which suggests that it may be a “good” within the meaning of the CISG. A further complicating factor is whether the grant of a software license, which is essentially a right to use the intellectual property of another, should be categorized as a contract of sale. See Sarah Green & Djakhongir Saidov, *Software as Goods*, J. BUS. L. 161, 175 (2007) (discussing the rights of a purchase of software). In the United States, the question of whether software is a “good” within the meaning of Article 2 of the UCC has generally been answered in the affirmative. See, e.g., *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 676 (3d Cir. 1991) (holding software is a good under Article 2 of the UCC). Many – though not all – of the national judges called upon to answer the same question with respect to the CISG have reached the same conclusion. See Hass, *supra*, at 224–25 (discussing German and Swiss cases holding that CISG applies to contracts for the sale of software). To remove all doubt as to their intentions, therefore, parties to international software agreements would be well advised to select the CISG if that is, in fact, what they want.

<sup>87</sup> The CISG was affirmatively chosen to govern exactly sixty-one contracts in the dataset. Of these, there were forty-two opt-in agreements involving at least one U.S. party. The data presented below is derived from these forty-two con-

chosen the CISG to govern their contracts do share a number of common features, as discussed below, the pattern that emerges from these opt-in contracts is one of idiosyncratic and somewhat haphazard decisions at the company level rather than one of companies rallying around a common standard.

First, with respect to industry, the overwhelming majority of U.S. companies whose contracts affirmatively selected the CISG were located in the manufacturing sector.<sup>88</sup> The largest subgroup within this sector was comprised of semiconductor companies.<sup>89</sup> The second largest subgroup was comprised of pharmaceutical companies.<sup>90</sup> To the extent that the CISG enjoys any pockets of support within the United States, therefore, the data suggest that these pockets of support may lie in the semiconductor industry, on the one hand, and in the pharmaceutical industry, on the other.

Second, with respect to product, the most common item bought and sold in these agreements was electronics equipment, including semiconductors and their component parts.<sup>91</sup> The second most common product was computer software, followed by medical equipment, industrial equipment, and pharmaceuticals.<sup>92</sup>

Finally, with respect to geographic location, a significant number of U.S. sellers that chose the CISG were located in California.<sup>93</sup>

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tracts.

<sup>88</sup> A total of thirty-four firms—out of forty-two—were based in the manufacturing sector based on their Standard Industrial Classification (“SIC”) code. All companies registered with the SEC are assigned a number in accordance with the SIC system. See Lynn M. LoPucki & Joseph W. Doherty, *Rise of the Financial Advisors: An Empirical Study of the Division of Professional Fees in Large Bankruptcies*, 82 AM. BANKR. L.J. 141, 155 n.43 (2008) (discussing federal government’s use of SIC classifications).

<sup>89</sup> Of the thirty-four firms in the manufacturing sector, thirteen of them produced electronics.

<sup>90</sup> Of the thirty-four firms in the manufacturing sector, five of them produced pharmaceuticals.

<sup>91</sup> Of the forty-two contracts reviewed, a total of nine were for the sale of semiconductors.

<sup>92</sup> There were eight contracts for the sale of computer software, seven contracts for the sale of medical equipment, and five contracts for the sale of industrial equipment.

<sup>93</sup> There were thirty-two contracts out of the forty-two surveyed in which the seller had its principal place of business in the United States. The sellers in fifteen of these contracts were based in California (48%). The sellers in nine of these contracts were based in Massachusetts (29%). There were, however, thirteen unique U.S. sellers based in California as compared to only two unique U.S. sellers based in Massachusetts; one Massachusetts seller entered into eight separate agreements in which the CISG was chosen as the governing law. In terms of broad-based

Indeed, there were almost as many California-based sellers as there were sellers in all other U.S. states combined.<sup>94</sup> The foreign buyers in these contracts tended to be located in Europe, North America, China, or Japan.<sup>95</sup> With respect to U.S. buyers transacting with foreign sellers, there was no evidence of geographic clustering—the buyers were scattered across the United States. The foreign sellers in these contracts, however, tended to be based in Europe.

The prototypical U.S. firm that affirmatively selects the CISG, therefore, is a California-based manufacturing company that sells semiconductors to counterparties based in Europe, North America, or the Far East. There are, however, relatively few contracts that match this prototype exactly. Those contracts that do conform to the prototype, moreover, tend to be older agreements negotiated prior to 2003. Nevertheless, there were enough hints scattered through the contracts dataset that California-based semiconductor companies may be favorably disposed to the CISG to warrant further inquiry. To this end, I contacted a number of California based attorneys who represent semiconductor companies to ask them if these companies did, in fact, utilize the CISG with any regularity.

The answer was a clear and unequivocal no. One attorney with fifteen years of practice experience in this area stated that “we generally exclude [the CISG] where we think it’s applicable” and that “this is the approach I generally see with companies where the lawyers are aware of the issue.”<sup>96</sup> A different attorney who works in-house at a well-known semiconductor manufacturer observed

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support that spans multiple different companies, therefore, the CISG would seem to enjoy more support among sellers in California than in Massachusetts.

<sup>94</sup> In eight contracts, both the buyer and seller were based in the United States. In some cases, the decision to select the CISG as the governing law between two U.S. entities may be explained by the context. In one contract, for example, the U.S. seller had previously purchased goods from an Italian seller and was looking to immediately resell these same goods to a U.S. buyer. *See* Powersource Corp., Distribution Agreement between Econowatt Corporation and Greenview Energy Inc. (Form 10-QSB, Exhibit 4.1, 2) (Nov. 30, 2001). In another, the U.S. seller was a wholly owned subsidiary of a foreign corporation and it appears that the true selling entity was the foreign corporation. *Emy’s Salsa Aji Distrib. Co., Distributor Agreement with Orbital Group, LLC* (Form SB-2, Exhibit 10.1) (Nov. 13, 2007). In other cases, however, it is not clear why the parties chose the CISG to govern their wholly domestic sales agreement.

<sup>95</sup> There were eleven North American counterparties (including U.S. buyers), ten European counterparties, four Japanese counterparties, and three counterparties based in China or Hong Kong.

<sup>96</sup> E-mail from Partner, Silicon Valley Law Firm, to author (Dec. 19, 2014) (on file with author).

that his company has long excluded the CISG from its international contracts as a matter of policy.<sup>97</sup> He cited “inconsistency” as to when the CISG will apply and the fact that the “CISG generally disfavors sellers” as reasons for this policy.<sup>98</sup> Still another attorney with more than twenty years of practice experience representing semiconductor companies observed that “everyone is spooked by the CISG” and that he had never seen a contract, or been part of a negotiation, in which a U.S. semiconductor company proposed that the CISG be selected as the governing law.<sup>99</sup> The general practice, he explained, was to exclude the CISG and try to have the contract governed by the law of California or New York. As a fallback, he said, companies would agree to have their contracts governed by the law of Hong Kong or Singapore.<sup>100</sup>

Each of the attorneys interviewed was adamant that the CISG, far from being embraced by California-based semiconductor companies, is actually strongly disfavored. A review of the remaining opt-in contracts, moreover, failed to uncover any other industries, products, or geographic locations within the United States in which the CISG appears to have gained traction.

#### *4.4. Some Companies That Have Previously Opted In to the CISG Now Opt Out*

While the CISG may lack widespread support, it was affirmatively selected in forty-two dataset contracts involving U.S. companies.<sup>101</sup> In order to discover why the treaty had been embraced by these companies, I sent letters to all of the U.S. companies that were parties to these agreements, and to many of the foreign ones as well, to ask why they had selected the CISG. Many of the letters were returned to me as undeliverable. This was disappointing, but not altogether surprising given that most of the contracts in question were executed prior to 2003. Many of the companies in ques-

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<sup>97</sup> E-mail from In-House Counsel, U.S. Semiconductor Company, to author (Feb. 20, 2015) (on file with author).

<sup>98</sup> *Id.*

<sup>99</sup> Telephone Interview with Partner, Silicon Valley Law Firm (Mar. 20, 2015).

<sup>100</sup> He explained that these jurisdictions are generally perceived to be rough U.S. equivalents when it came to the structure and content of their law because of their historical connections with English law. *Id.*

<sup>101</sup> It was also selected in nineteen contracts between two foreign companies. These nineteen contracts are discussed at greater length in Part 5.



tion had gone out of business or been acquired in the intervening years. Ultimately, I received ten replies to my letters and follow-up e-mails. In three cases, the company replied to inform me that that no information would be forthcoming in response to my inquiry. In seven cases, I was personally contacted by a company representative via telephone or e-mail.<sup>102</sup> These seven responses, which are discussed at some length below, offer invaluable insight into the process of corporate decision making with respect to choice-of-law determinations as they relate to the CISG.

The most striking finding was that all seven of the company representatives who contacted me reported that their company's general policy was to exclude the CISG. These responses were remarkable because each of these companies was contacted *specifically because it had previously selected the CISG as the governing law in a particular agreement*. Indeed, the entire point of contacting these companies was to try to figure out how and why they had embraced the CISG. If ever there were a group of U.S. companies that was likely to contain at least one CISG enthusiast, this would have been that group. In each instance, however, the company representative stated that the company typically excluded the CISG from its international contracts as a matter of policy.

The company representatives offered a wide range of explanations as to why, precisely, their general policy was to exclude the CISG. One representative observed that his company typically excluded the CISG because he and the other lawyers there were all trained in the UCC—and hence more familiar with it—and because there were more cases in which courts in the United States have applied the UCC.<sup>103</sup> A different representative noted that his company excluded the CISG from its contracts on the advice of an outside counsel who was generally more familiar with California law. Still another representative stated that her company excluded the CISG in its supply contracts because it preferred for its contracts to be governed by national sales law whenever possible.<sup>104</sup>

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<sup>102</sup> It should be emphasized that the qualitative data outlined below are subject to many of the same biases that infect all surveys to one degree or another. See *supra* notes 47–49 and accompanying text (discussing survey bias). These biases are, however, somewhat less salient in this context because the information derived from company interviews is being used to confirm conclusions generated through a review of existing contracts.

<sup>103</sup> Telephone Interview with Associate General Counsel, U.S. Company (Jan. 8, 2015).

<sup>104</sup> E-mail from Legal Counsel, Swiss Pharmaceutical Company, to author (Jan. 7, 2015) (on file with author).

In two instances, the company representative was able to provide a more-or-less complete account of the process that led to the CISG being chosen with respect to a particular agreement. In each instance, the choice of the CISG was attributable to the presence of special circumstances unlikely to arise in the ordinary course of business. In the first case, the CISG was chosen because the parent companies negotiating the contract were based in Mexico and Hong Kong and the goods in question were to be transported from Canada to Mexico via the United States before the buyer took delivery. Under these unusual circumstances, the representative explained, it made sense for the contract to be governed by a body of law that was the same in all of the relevant jurisdictions.

In the second case, the company representative explained that historical vagaries had led to a long tradition of commercial contracts with Russian (and, before that, Soviet) entities being governed by Swedish law.<sup>105</sup> In the contract at issue, where the parties were having difficulty reaching agreement on governing law, the U.S. buyer had proposed that the parties draft their contract to state that it would be governed by *both* the law of Sweden *and* the CISG. The goal in this case, in other words, was to move away from a body of law with which its attorneys were largely unfamiliar (Swedish law) and towards a body of law with which its attorneys were marginally more familiar (the CISG). This goal was realized when the Russian counterparty agreed to the proposal.

When the respondents outlined their basic hierarchy of preferences when it came to the governing law, virtually all of them expressed a clear preference for national law as an alternative to the CISG. Their stated first preference was for the national sales law of their “home” country. A second-best outcome was for the contract to be governed by the national sales law of a “neutral” third country. The list of such countries whose law would be potentially acceptable included Canada, Delaware, England, France, Hong Kong, New York, Singapore and Switzerland.<sup>106</sup> Many of the re-

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<sup>105</sup> Telephone Interview with Associate General Counsel, U.S. Company (Jan. 8, 2015).

<sup>106</sup> This same hierarchy of preferences was expressed by a different attorney—who works in-house at a major U.S. semiconductor manufacturer—whose employer did not have any contracts in the dataset. He stated that his company generally prefers to have its contracts governed by the law of Delaware, New York, or Oregon. If a foreign counterparty is reluctant to have an agreement governed by U.S. law, however, the company will sometimes agree to have its con-

spondents reported that if it came down to a choice between the national sales law of a third country with no connection to the transaction or the CISG, they would prefer the national sales law of the third country. Again, this result was surprising because each of the companies in question was contacted precisely because it had affirmatively chosen the CISG as the governing law in the past.

In one instance, I received responses from companies that were on opposite sides in a particular contract negotiation. The former president of a U.S. pharmaceutical company e-mailed me to state that he could not recall why the CISG was chosen to govern a contract between his Texas based company and a Swiss counterparty in 2009.<sup>107</sup> The Swiss counterparty also contacted me to report that the company generally excluded the CISG from its international agreements and that she could only “assume that the choice-of-law provision in this particular contract was amended in the negotiations with [the U.S. counterparty].”<sup>108</sup> In this particular case, therefore, neither contracting party was able to provide an explanation as to why the CISG was selected as the governing law in their contract.

Finally, the president of a Virginia-based information technology company reported that his company has been engaged in various international transactions over the years. When asked about the role that the CISG played in a reseller agreement from 2006, he explained that the company used the “UN funding” for “world court” purposes but that it switched to the Uniform Commercial Code for purely domestic agreements.<sup>109</sup> He then remarked upon the importance of venue, stating that “if it’s the UN transactions, then you’re at the world court in New York” and that you “can’t choose to have international transactions governed by the North Carolina Supreme Court.”<sup>110</sup> This particular response indicates that the CISG remains a largely unknown quantity in some quarters

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tracts governed by the law of England, Wales, Hong Kong, or Singapore. E-mail from In-House Counsel, U.S. Semiconductor Company, to author (Feb. 20, 2015) (on file with author). This attorney also noted that his company excluded the CISG from its contracts as a matter of policy. *Id.*

<sup>107</sup> E-mail from former President, U.S. Pharmaceutical Company, to author (Feb. 6, 2015) (on file with author).

<sup>108</sup> E-mail from Legal Counsel, Swiss Pharmaceutical Company, to author (on file with author) (alternations in original).

<sup>109</sup> Telephone Interview with President, Virginia-based Information Technology Company (Jan. 20, 2015).

<sup>110</sup> *Id.*

more than twenty-five years after it entered into force.

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In summary, the contract evidence derived from the dataset suggests that the overwhelming majority of U.S. contracts that reference the CISG do so for the sole purpose of excluding it. It is common for U.S. companies to exclude the CISG from contracts to which it would never apply by its terms. The number of U.S. contracts in which the CISG is affirmatively chosen as the governing law—never large—is declining. There does not appear to be a single industry or geographic location within the United States in which companies have embraced the CISG as an alternative to national sales law. And some companies that affirmatively opted into the CISG in past years now report that their general practice is to exclude the treaty from their international sales contracts.

The Global Sales Law Survey, it will be remembered, found that only 54% of U.S. attorneys “sometimes” or “always” advise their clients to opt out of the CISG.<sup>111</sup> This result is impossible to reconcile with the results from the review of the dataset contracts. The dataset evidence suggests that the actual level of support for the CISG among U.S. lawyers is much, much lower than suggested by the Global Sales Law Survey. Whatever the merits of the CISG, it has made scant little headway in gaining adherents among practicing lawyers in the United States in the twenty-eight years since it entered into force.

## 5. EVIDENCE OF VARYING PRACTICE IN CHINA

Although U.S. companies have failed to embrace the CISG, the same cannot be said for companies in other nations. There were a number of contracts in the dataset—nineteen to be exact—in which two foreign companies affirmatively chose the CISG as the law to govern their agreement. A review of these wholly foreign contracts is useful because it offers a sense of how the CISG is used when no U.S. company is a party to the transaction. As it so happens, a review of these wholly foreign contracts reveals a pattern of practice that is quite different from the practice evidenced in the

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<sup>111</sup> See *supra* notes 37–38.

U.S. agreements. More than two-thirds of the wholly foreign contracts (thirteen out of nineteen) were sales contracts involving a Chinese solar company.<sup>112</sup> All of these agreements were negotiated after 2007. All of them called for the sale of materials used in the construction of solar panels.<sup>113</sup> And all of them affirmatively selected the CISG as the governing law.<sup>114</sup>

The finding that Chinese solar companies have embraced the CISG in their international sales contracts indicates that the perceived utility of that treaty in transactional planning can vary by nationality and industry. The mere fact that the CISG has made little headway in the United States, in short, does not mean that it is failing to achieve its broader goal of facilitating international trade. Indeed, the fact that some Chinese companies routinely choose to opt in to the CISG suggests a possible pathway by which the CISG could come to be more broadly accepted by U.S. companies.<sup>115</sup> As Lisa Spagnolo has written: “China’s relatively strong economic position . . . could ultimately serve to slowly force CISG exposure on more reluctant jurisdictions such as the US, Canada, and Australia, where environments of unfamiliarity and high learning costs so far still harbour automatic opt-outs.”<sup>116</sup> While time alone will determine the extent to which Chinese choice-of-law preferences will influence U.S. practice, the claim that Chinese companies are marginally more supportive of the CISG than those in many other jurisdictions derives strong support from the patterns of practice among the dataset contracts.<sup>117</sup>

This claim derives further support from a phone interview that I conducted with several representatives from a Chinese solar

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<sup>112</sup> Seven different Chinese solar companies were parties to at least one of these agreements.

<sup>113</sup> Three of the remaining contracts were entered into by a single Peruvian buyer seeking to obtain various pieces of large industrial equipment from sellers in Germany, Russia, Brazil, and Peru. Two contracts were negotiated by a single Canadian fuel cell company with counterparties in South Korea and Japan. In the final contract, a Brazilian company contracted to sell pharmaceuticals to a Chinese buyer.

<sup>114</sup> The counterparties to the contracts with Chinese solar companies were overwhelmingly located in Europe.

<sup>115</sup> See Lisa Spagnolo, *Green Eggs and Ham: The CISG, Path Dependence, and the Behavioural Economics of Lawyers’ Choices of Law in International Sales Contracts*, 6 J. PRIV. INT’L L. 417, 427 – 28 (2010).

<sup>116</sup> *Id.* at 463.

<sup>117</sup> See Schroeter, *supra* note 12, at 654 (criticizing U.S. courts for requiring “explicit” opt-outs from the CISG and arguing that this approach is at odds with the purpose and legislative history of Article 6).

company based in Shanghai. The company for which they worked had entered into a contract that selected the CISG to govern the sale of solar panels from the Chinese seller to a Spanish buyer.<sup>118</sup> One company representative, who dealt primarily with customers in Europe, explained that the company generally preferred to have its sales contracts governed by the CISG rather than by national law.<sup>119</sup> When asked why, she stated that the CISG offered “very clear and simple remedies to the seller.”<sup>120</sup> She observed that most of the company’s counterparties in Europe were “sophisticated buyers” and that these buyers were generally open to having the CISG govern the sales agreement.<sup>121</sup> She also explained that in the rare cases in which a European counterparty insisted that the CISG be excluded, and balked at the selection of Chinese law, the company’s preference was to have the contract be governed by German national sales law because it is relatively easy for Chinese lawyers to research German law.<sup>122</sup>

This same representative noted that it was somewhat unusual for the company to affirmatively name the CISG as the governing law in the contract. Ordinarily, she explained, the company would simply select the law of Germany without making any reference to the CISG at all.<sup>123</sup> In making this selection, she added, the company was fully aware that the CISG would often apply as a default rule despite the fact that the treaty was not expressly mentioned anywhere in the agreement.<sup>124</sup>

A different representative from the same company who dealt primarily with customers in Australia then pointed out that the company’s contracting practice was quite different when it came to Australian counterparties.<sup>125</sup> The Australians, he explained, typically insisted that the CISG be excluded from their international sales contracts.<sup>126</sup> Still another representative then chimed in to add that it was also common for customers in England to request

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<sup>118</sup> Telephone Interview with Legal Counsel at Chinese Solar Company (Feb. 10, 2015).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

that the CISG be excluded.<sup>127</sup> A different representative who dealt with the Japanese market added that there was a greater variety of practices when it came to Japanese buyers. Some were happy to have the CISG govern the contract, while others insisted that it be excluded.<sup>128</sup>

Significantly, the representatives from this particular Chinese solar company were the only attorneys I spoke to in the course of researching this Article who expressed real enthusiasm for the CISG. In stark contrast to their U.S. counterparts, the CISG was the clear first preference of these Chinese attorneys when drafting choice-of-law clauses. Their second preference was for Chinese or German national law. When these options were unavailable, they would sometimes accept the national sales law of England, Australia, or Japan.

This enthusiasm for the CISG among Chinese solar companies may be attributable to the fact that Chinese national sales law bears more than a passing resemblance to the CISG.<sup>129</sup> In 1999, China undertook a substantial revision of the country's contract law. In undertaking these revisions, the Chinese drafters "consulted and absorbed rules of the CISG on offer, acceptance, avoidance (termination), . . . liabilities for breach of contract, interpretation of a contract, and sales contract."<sup>130</sup> This reliance has prompted at least one commentator to observe that "the CISG has quite a lot of impact on [Chinese Contract Law]."<sup>131</sup> In some ways, therefore, the Chinese embrace of the CISG is less a manifestation of a commitment to the harmonization of international commercial law than an attempt to have the contract governed by a variant of Chinese national sales law. For better or worse, most companies crave the familiar when it comes to choice of law. To the extent that the CISG is more familiar to Chinese companies as a result of its having been substantially incorporated into Chinese domestic law, it stands to reason that these companies would be more open to

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See DETLEV F. VAGTS, WILLIAM S. DODGE, HAROLD HONGJU KOH & HANNAH L. BUXBAUM, *TRANSNATIONAL BUSINESS PROBLEMS* 255 (5th ed. 2014) (explaining how drafters of China's 1999 Contract Law deliberately modeled provisions after the UNIDROIT Principles of International Commercial Contracts and the CISG).

<sup>130</sup> Shiyuan Han, *The CISG and Modernisation of Chinese Contract Law*, 17 *CONTRIBUTIONS TO THE STUDY OF INT'L TRADE AND ALT. DISPUTE RESOLUTION IN THE S. PAC.* 71 (2014) (internal citations and quotation marks omitted).

<sup>131</sup> *Id.* at 79.

choosing the CISG in their international sales agreements.

## 6. SELECTING THE LAW OF A U.S. STATE

The analysis in preceding Parts examined contract practice where the contract in question *referenced* the CISG. This methodological approach may, however, fail to fully capture the nature of U.S. contract practice with respect to the CISG. As noted above, it is possible for the CISG to supply the governing law even where a contract makes no mention of it. When parties choose to have their international sales contract governed by the law of New York, for example, the contract will typically be governed by the CISG. U.S. courts have reasoned that New York law necessarily includes all forms of federal law, and that the CISG—as a properly ratified federal treaty—is therefore a part of the law of New York.<sup>132</sup> To select the law of New York, therefore, is to select the CISG indirectly.<sup>133</sup> If U.S. firms routinely select the law of a particular U.S. state in full knowledge that this selection will result in the application of the CISG, then it may well be that the treaty is making inroads into U.S. practice in ways that are not captured by the analysis in the preceding Parts.<sup>134</sup>

In order to test this possibility, I worked with a team of research assistants to assemble a secondary contract dataset. This dataset consisted of international supply contracts filed with the SEC between 2011 and 2015. Each research assistant was instructed to conduct a search for “supply /2 agreement” in the “Material Contracts” section of the EDGAR database. These searches were conducted through the LexisNexis portal. They resulted in 5,549 hits. A research assistant then reviewed each of these agreements to determine whether the contract at issue was an “international” supply agreement involving at least one U.S. party and one foreign

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<sup>132</sup> See *supra* note 61.

<sup>133</sup> See *Am. Mint LLC v. GOSoftware, Inc.*, Civil Action No. 1:05-CV-650, 2005 U.S. Dist. LEXIS 45003, at \*9 (M.D. Pa. Aug. 16, 2005) (“The alleged contract in this case contains a provision selecting Georgia law as the law governing disputes under the contract; however, the contract fails to expressly exclude the CISG by language which affirmatively states it does not apply.”) (citation omitted).

<sup>134</sup> But see Ingeborg Schwenzer & Christopher Kee, *International Sales Law – The Actual Practice*, 425 PENN ST. INT’L L. REV. 425, 435 (2011) (observing that “some parties do believe that they are excluding the CISG when simply not mentioning it in their choice-of-law clause”).



counterparty. Once this process was complete, I was left with 248 international supply agreements.

I then reviewed each of these agreements to determine: (1) whether it excluded the CISG; (2) whether the foreign counterparty had its principal place of business in a country that had not ratified the CISG; (3) whether the agreement was an amendment to a prior agreement; (4) whether the agreement in question selected foreign law; and (5) whether it was a repeat of another contract in the secondary dataset. If the answer to any of the preceding queries was in the affirmative, I eliminated the contract from the dataset.<sup>135</sup> After this review was complete, I was left with a group of forty-four international supply agreements, each of which contained a choice-of-law clause selecting the law of a U.S. state and none of which excluded the CISG. Although the CISG went unmentioned in these contracts, it would likely have supplied the governing law.

I then sent letters to the forty-four U.S. companies that were party to each of these contracts to ask what they intended when they selected the law of a U.S. state to govern the contract. Did they intend for the contract to be governed by the CISG? Or did they intend for the contract to be governed by the chosen U.S. state's version of Article 2 of the Uniform Commercial Code? I received nine responses.<sup>136</sup> Significantly, not a single respondent indicated that the company intended to select the CISG when it chose the law of a U.S. state.

One respondent stated: "We did not consider CISG at all."<sup>137</sup> Another noted (somewhat ruefully) that: "We had no clue. Our intent when we signed that agreement was absolutely that it was going to be governed by the law of the state of Florida."<sup>138</sup> Another

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<sup>135</sup> Ultimately, I eliminated: forty-nine contracts from the secondary dataset because they opted out of the CISG; forty-four contracts because the counterparty had its place of business in a country that had not ratified the CISG; thirty-seven contracts because they selected the law of a country that had ratified the CISG; and one contract because it opted in to the CISG. The remaining seventy-four contracts were excluded because they: (1) were repeats; (2) were amendments to previous contracts; (3) were formatted in a manner that made them unreadable; or (4) did not contain a choice-of-law clause.

<sup>136</sup> In two cases, a company responded merely to inform me that it would not provide an answer to the question.

<sup>137</sup> E-mail from In-House Counsel, U.S. Pharmaceutical Company I, to author (Feb. 29, 2016) (on file with author).

<sup>138</sup> Telephone Interview with General Counsel, U.S. Manufacturing Company

respondent observed that: "We did not intend for the stated choice of law to be eviscerated by the CISG. We have an updated provision in our new contracts to explicitly disclaim the effect of the CISG, but several legacy agreements (done when we were less sophisticated) have not been updated."<sup>139</sup> Another respondent queried whether the contract in question would actually have been governed by the CISG since it dealt with a number of issues in addition to sales, but stated that the company's general policy was to opt out: "We do not have a policy of choosing the CISG indirectly and we would affirmatively state that it was to govern if that was the intent."<sup>140</sup> Another respondent declared that: "I am not aware that we have ever had occasion to think about the point you raise."<sup>141</sup> Yet another respondent stated that: "We would never select the law of Indiana, say, as a means of getting the [CISG]. We are just not that Machiavellian."<sup>142</sup> None of these responses are consistent with the notion that U.S. companies routinely select the CISG indirectly by choosing the law of a U.S. state. They suggest instead that these companies are often unaware that the selection of U.S. state law will result in the application of the CISG and, consequently, unknowingly fail to opt out.<sup>143</sup>

These findings are generally consistent with ordinary intuitions about how corporate lawyers go about their work. Transactional attorneys as a group, and particularly those attorneys who advise public companies, tend to prefer contracts that are clear to those that are opaque. If these attorneys wanted the CISG to supply the governing law with respect to a contract, one would expect them to say as much in their choice-of-law clauses.<sup>144</sup> One would not ex-

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(Apr. 11, 2016).

<sup>139</sup> E-mail from In-House Counsel, U.S. Technology Company, to Author (Mar. 4, 2016) (on file with author).

<sup>140</sup> E-mail from In-House Counsel, U.S. Pharmaceutical Company II, to Author (Feb. 29, 2016) (on file with author).

<sup>141</sup> E-mail from In-House Counsel, U.S. Energy Company I, to Author (Mar. 18, 2016) (on file with author).

<sup>142</sup> Telephone Interview with General Counsel, U.S. Investment Company (Apr. 15, 2016).

<sup>143</sup> See Gilles Cuniberti, *Is the CISG Benefiting Anybody?*, 39 VAND. J. TRANSNAT'L L. 1511, 1513 (2006) (arguing that "the vast majority of . . . buyers and sellers have not benefited [from the CISG], due to a lack of sophistication.").

<sup>144</sup> To illustrate this point, consider the following two scenarios. In the first, the parties say: "We would like for this contract to be governed by the CISG. Therefore, we will choose New York law but will make no mention of the CISG because we know that the choice of New York law will result in the CISG's application so long as we do not specifically exclude it." In the second, the parties say:

pect them to select the CISG indirectly by relying on an interpretive rule that most, though not quite all, U.S. courts have decided to follow.<sup>145</sup> Moreover, choice-of-law issues are not always at the forefront of the attorneys' minds when they are drafting commercial agreements.<sup>146</sup> As one respondent explained:

[I]n the ordinary course of commerce, where there are lots of contracts flying around all the time, and time/cost are always issues, it is not uncommon to agree to a choice of law without doing a detailed analysis of how that jurisdiction's laws work for you or against you. Unless you have a crystal ball, you don't know what your issues are going to be, so you don't always know what to worry about . . . Often, you agree to go with a particular jurisdiction's laws because (i) it's a bigger state (e.g., NY or CA) that you know will have plenty of precedent to work with, (ii) you worry about being home towned by your counter-party (I know, venue is different from choice of law, but they do get blurred a little), (iii) you do have particular experience on a particular point that you think might be relevant, or (iv) something else dictates (lenders, a prime contract, etc.). In truth, I usually worry more about the venue than the choice of law.<sup>147</sup>

Amid these many competing priorities, this respondent concluded that he "would bet that the folks on both sides of the agreement were not aware of the CISG and the manner in which it

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"We would like this contract to be governed by the CISG. Therefore, we will reference the CISG and specify that New York law shall govern all matters not covered by the CISG." While it is certainly possible that some U.S. attorneys whose clients wanted the CISG to apply would adopt the first approach to contract drafting, it seems more plausible that most would adopt the second.

<sup>145</sup> At least one court has declined to follow this interpretive rule. See *Am. Biophysics Corp. v. Dubois Marine Specialties*, 411 F. Supp. 2d 61, 63 (D.R.I. 2006) (concluding that a choice-of-law clause selecting the law of Rhode Island was sufficient for the court to deny the application of the CISG to the case).

<sup>146</sup> See LEA BRILMAYER ET AL., *CONFLICT OF LAWS: CASES AND MATERIALS* 698 (7th ed. 2015) ("[S]urprisingly often, the parties do not even bother to research the chosen law before they include a clause selecting it.").

<sup>147</sup> E-mail from In-House Counsel, U.S. Energy Company II, to Author (Mar. 3, 2016) (on file with author).

trumps local law.”<sup>148</sup>

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In light of the foregoing analysis, it seems clear that the conclusion set forth above—that the CISG has no real constituency among public companies in the United States—still holds.<sup>149</sup> The data generated by the contracts in the secondary dataset provide little support for the notion that U.S. companies routinely select the CISG indirectly by choosing the law of a particular U.S. state. This data also suggests that the interpretive rule followed by most U.S. judges to date—that U.S. state law necessarily includes federal law, and that the selection of law of a particular state amounts to the choice of the CISG—does not necessarily align with the expectations of U.S. companies entering into state law contracts.<sup>150</sup> In summary, there is no evidence from the secondary dataset that U.S. companies that select the law of a U.S. state want the CISG to govern their international supply agreements.<sup>151</sup>

## 7. CONCLUSION

In much of the legal literature, the fact that the CISG has been ratified by eight-five nations constitutes incontrovertible evidence of the treaty's success. The problem with this account is that it fails

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<sup>148</sup> *Id.*

<sup>149</sup> When a U.S. company is a party to an international sales contract containing a choice-of-law clause selecting *foreign* law, there may be an element of gamesmanship. In these cases, the U.S. company may strategically concede the choice of governing law in full knowledge that the contract will be governed by the CISG rather than the national sales law of the foreign nation. The Chinese solar company discussed in the previous Part followed precisely this strategy when it agreed on its international sales contracts being governed by German law. See *supra* note 124 and accompanying text. It would make little sense, however, for a U.S. company to follow such a strategy when the law chosen is the law of U.S. jurisdiction.

<sup>150</sup> See generally Johnson, *supra* note 61 (discussing cases in which parties in a suit had chosen a state law to govern without realizing CISG would apply by default).

<sup>151</sup> Cf. Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 414 (2004) (“If the reason for the gap was that the parties did not even consider the issue addressed by the default rule, it is much harder to infer consent to the rule.”).

to acknowledge that private parties can choose to exclude the CISG from their international sales contracts. The fact that U.S. companies routinely choose to exclude the CISG necessarily calls into question whether the CISG is actually achieving its goal of facilitating international trade. In order to answer to this question, it would be helpful if scholars were to conduct additional contract surveys *outside* the United States in order to determine whether U.S. practice is representative or atypical. As discussed above, the Global Sales Survey arguably overstates the level of support that the CISG enjoys within the United States by a significant margin. If this same survey also overstates the CISG's support in foreign jurisdictions, such a finding would necessitate a thorough reevaluation of the treaty's efficacy.

Even in the absence of additional information relating to foreign contract practice, the evidence relating to U.S. practice raises difficult questions about the current role of the CISG in resolving transnational disputes in U.S. courts. As things currently stand, the CISG often applies only where the U.S. contracting party is unsophisticated.<sup>152</sup> In a number of cases in which the CISG has come up in U.S. litigation, the parties seem to have had no idea that it would apply *ex ante*.<sup>153</sup> It is plausible—indeed, it is likely—that

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<sup>152</sup> Sophisticated U.S. companies are more likely to opt out of the CISG. E-mail from In-House Counsel, U.S. Technology Company, to Author (Mar. 4, 2016) (on file with the author) (explaining that “[w]e did not intend for the stated choice of law to be viscerated by the CISG. We have an updated provision in our new contracts to explicitly disclaim the effect of the CISG, but several legacy agreements (*done when we were less sophisticated*) have not been updated.”) (emphasis added).

<sup>153</sup> Reimann, *supra* note 62, at 123 – 24 (finding that the CISG applied in many cases because the parties did not opt out, rather than because they meant for the CISG to apply); *see also* Hanwha Corp. v. Cedar Petrochemicals, Inc., 760 F. Supp. 2d 426, 431 (S.D.N.Y. 2011) (“In this case, the parties each attempted to opt out of the CISG, but could not agree on the law to displace it . . . [and so] their competing choices must fall away, leaving the CISG to fill the void by its own self-executing force.”). There appears to be only one published case in the United States in which the parties affirmatively chose the CISG to govern their agreement. *See* Harry M. Flechtner & Ronald A. Brand, *Opting In to the CISG: Avoiding the Redline Products Problems*, in A TRIBUTE TO JOSEPH M. LOOKOFISKY 97 (Mads Bryde Andersen & René Franz Henschel eds., Djøf Publishing, Copenhagen 2015). In that case, however, the parties *also* chose the law of South Africa—a nation that has not ratified the CISG—as the law to govern their agreement. *Id.* This inconsistency undercut the notion that the parties in question truly wanted the CISG to govern their agreement. In light of the confusion engendered by the conflicting choice-of-law clauses, the court ultimately applied New Jersey law. *See* FPM Fin. Serv., LLC v. Redline Prods. Ltd., Civil Action No. 10-6118 (MAS) (LHG), 2013 WL 5288005, at \*3 (D.N.J. Sept. 17, 2013).

many of these parties would have excluded the CISG if they had known enough to do so. This raises serious questions as to whether the CISG accurately captures the unstated preferences of the U.S. parties to these international sales agreements. Over time, it may be that the cases generated by international sales contracts that fail to exclude the CISG will produce a body of case law that may lead more sophisticated companies to adopt it. For now, however, the burden of developing this case law would seem to fall primarily upon U.S. litigants who do not know enough to exclude it.